UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **ROBERT EUGENE AGNEW,** Debtor.	Case No. **04-62073-7**

MEMORANDUM OF DECISION

At Butte in said District this 14th day of April, 2005.

In this Chapter 7 bankruptcy, which was converted from Chapter 13 upon Debtor's motion by Order entered January 5, 2005, Debtor's former[1] attorney James H. Cossitt ("Cossitt") filed his Second Application for Professional Fees and Costs on February 14, 2005, ("Second Application") requesting an additional award of attorney's and paralegal fees in the amount of $17,994.00 and costs of $305.14 as an administrative expense of the estate. Objections were filed by creditor Susan Smith ("Smith"), who is Debtor's former common law spouse, and by the Chapter 7 panel Trustee Don W. Torgenrud ("Torgenrud") on February 24, 2005, on the grounds Cossitt's services were not necessary or beneficial to the estate and reorganization was never a viable possibility, citing this Court's decisions in *In re Berg*, 268 B.R. 250, 260, 19 Mont. B.R. 232, 245-46 (Bankr. D. Mont. 2001) and *In re Crown Oil*, 257 B.R. 531, 539, 18 Mont. B.R. 505,

[1]Cossitt filed a motion to withdraw as Debtor's attorney on January 19, 2005, pursuant to Mont. LBR 2090-5, citing Mont. Rules of Professional Conduct 1.16 and the Debtor's failure to cooperate in amending his Schedules and Statement of Financial Affairs to include undisclosed assets and gifts. No objection was filed, and Cossitt was authorized to withdraw as Debtor's attorney by Order entered February 2, 2005.

513-14 (Bankr. D. Mont. 2000) (amended 18 Mont. B.R. 525 (Bankr. D. Mont. 2000)), *aff'd.*, (9th Cir. BAP September 28, 2001) (unpublished decision).

After due notice, a hearing on Cossitt's Second Application was held at Missoula on March 10, 2005. Cossitt appeared and testified in support of his Second Application. No exhibits were admitted. Smith was represented by attorney Andrew Pierce ("Pierce"), and Torgenrud appeared in opposition. Cossitt requested a directed verdict on the paralegal billing rate of $70 included in both his Applications based upon this Court's Memorandum of Decision and Order entered January 31, 2005[2]. At the close of the hearing the Court took Cossitt's Second Application under advisement. After review of the record, this matter is ready for decision.

This Court has jurisdiction over this Chapter 7 bankruptcy under 28 U.S.C. § 1334(a). Cossitt's Second Application for professional fees and costs is a core proceeding concerning administration of the estate under 28 U.S.C. §§ 157(b)(2)(A) and (B). For the reasons set forth below Cossitt's Second Application is denied in its entirety as Cossitt failed his burden to show his services were necessary and beneficial to the estate, and Cossitt's allowed professional fees and costs in this case are limited to the $4,677 and $362.12 awarded by Order entered by the Court on January 31, 2005, as a second-tier administrative expense.

FACTS

Debtor Robert Eugene Agnew (hereinafter "Agnew" or "Debtor") filed a voluntary Chapter 13 petition on July 2, 2004, represented by Cossitt. Cossitt testified that the Chapter 13 petition filed by the Debtor was not driven by animosity towards Smith, who had obtained a state

[2]That decision awarded Cossitt interim professional fees in the amount of $4,677 and costs in the sum of $362.12 as a second-tier administrative expense.

court judgment against Agnew, but he admitted that Agnew was not pleased with Smith. Cossitt testified that the reason the case was filed was to take advantage of the preference period under 11 U.S.C. § 547[3] to avoid Smith's judgment as a preference notwithstanding the judgment's basis on fraud. Cossitt testified that he chose Chapter 13 instead of Chapter 7 in addition because Smith's judgment based on fraud may be dischargeable under Chapter 13 but not in a Chapter 7 case, and to lock in possession of his homestead against Smith's efforts to recover on her judgment.

The Schedules and Statements were filed on July 12, 2004. Cossitt testified that in preparation of Debtor's Schedules he interviewed Agnew and looked at the documents from Smith's state court litigation against Agnew, spoke with Agnew's prior attorney, and performed a title search.

Debtor's Schedule D lists real property valued at $400,000 which is described as Debtor's homestead[4], and which is encumbered by a secured claim in the amount of $466,911.00. Schedule B lists personal property with a total value of $41,295. Schedule C lists exemptions, including Debtor's homestead exemption claimed in the amount of $100,000.

Schedule D lists $495,495 in secured claims, including Smith's claim based on a judgment entered 4/8/04 in Lake County Montana District Court case # DV-02-14 (Smith's

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[3]Section 547(b)(4)(A) provides for a 90-day period before the date of the filing of a petition, within which the trustee may avoid a transfer. Section 547(b)(4)(B) extends that period to one year if the creditor receiving the transfer was an insider.

[4]Schedule A includes a complete legal description of the real property in Section 19, Township 19 North, Range 20 West, P.M.M., Lake County, Montana, with an address of 4657 W. Post Creek Road, Charlo, MT 59824. The address on the Debtor's petition is "4651" W. Post Creek Rd.

"state court judgment"). Schedule D lists Smith's claim in the amount of $468,958.00, with an unsecured portion of $68,958.00. The other secured claim listed is Glacier Bank, secured by vehicles. Schedule E lists priority claims consisting of property taxes owed to Lake County Treasurer for 2002 and 2003 totaling $6,109.00. Schedule F lists three (3) general unsecured claims totaling $29,000, including a loan from Gene Agnew, credit card purchases owed to Bank One of $9,000, and a legal bill owed to Debtor's attorney Clinton J. Fischer in the sum of $15,000 for legal services rendered[5].

Schedule I lists Debtor's monthly income as a self employed realtor in the amount of $1,000.00, and from social security benefits in the amount of $789, for a total of $1,789. Schedule J lists monthly expenses in the amount of $1,731, leaving $58 per month available for plan payments. The Statement of Financial Affairs states that Debtor had received $0.00 income from his self employment as a realtor to date in 2004, but earned $21,308.45 in 2003. Debtor's other income came from social security benefits and "pasture rent". Certain gifts and transfers of horses and other property are disclosed on the Statement of Financial Affairs. The box "None" is marked at Item 9 of the Debtor's Statement, for "Payments related to debt counseling or bankruptcy". The Disclosure of Compensation of Debtor's attorney dated the same date, 7/12/04, and filed with Debtor's Schedules and Statements, states that Cossitt received $4,000.00 prior to the filing of the Statement.

Debtor filed his Chapter 13 Plan on July 21, 2004, proposing monthly plan payments of $58 per month for 36 months. Cossitt testified that he believed the Debtor had the income to

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[5]Schedule B lists a claim against Clinton J. Fischer in an unknown amount for legal malpractice, under "Other contingent and unliquidated claims of every nature . . . ."

fund the Plan from his social security and income from real estate sales. Smith is not listed in the Plan as an impaired secured creditor, only Glacier Bank is. Paragraph 6 provides that the Debtor's real property will be sold and proceeds paid into the Plan after deduction of the homestead exemption and costs of sale, with unsecured claims to receive at least $281,000. Paragraph 7 of the Plan states under penalty of perjury that all Debtor's federal and state tax returns due as of the date of the Plan have been filed with the appropriate agency. That statement was not true when made, and Debtor's failure to file tax returns prompted the Trustee's motion to dismiss filed August 25, 2004[6].

Smith filed a motion to modify stay and objection to Debtor's homestead and other exemptions. Cossitt responded and moved for sanctions against Smith for violation of the automatic stay. Protracted litigation between Smith and the Debtor ensued, including about how to proceed with discovery and depositions, a motion filed by Cossitt to quash a subpoena issued on behalf of Smith against a nondebtor, Mission Meadow RV Campground and Ed Slover ("Slover") in whose real estate office Agnew subsequently testified he worked, and Smith's request for show cause hearing. Cossitt testified that Smith initiated discovery utilizing improper rules which required his response. The parties finally resolved the discovery dispute by stipulation approved September 14, 2004.

Seven (7) Proofs of Claim have been filed in this case, including priority claims filed by the United States of America, Internal Revenue Service ("IRS") which were not listed on

[6]The Debtor did not file all required returns until 9/30/04, according to the Notice filed by Cossitt (Docket No. 67) on October 8, 2004.

Schedule E[7]. Unsecured nonpriority claims were filed by Bank One Delaware, NA ("Bank One") in the amount of $8,568.00[8]; and by Clinton J. Fischer in the amount of $13,918.07. Unsecured claims filed presently total $22,509.08[9].

Smith filed Proof of Claim No. 5 on October 22, 2004, asserting a secured claim in the amount of $466,911.24 based upon her state court judgment dated April 8, 2004. Attached to Smith's Proof of Claim are "Findings of Fact, Conclusions of Law and Judgment" from the state court case. Smith's judgment award against Agnew from state court is based, according to the "Findings of Fact, Conclusions of Law and Judgment" on the Debtor's breach of contract, actual fraud, malicious prosecution of common law marital dissolution proceedings. Cossitt testified that his advice to file for relief under Chapter 13 rather than Chapter 7 was based in part on the super discharge available under Chapter 13 for a debt based on fraud. *See* 11 U.S.C. § 1328(a).

On September 23, 2004, the Debtor filed his complaint in Adversary Proceeding No. 04/00103, seeking to avoid Smith's judgment as a preferential transfer under 11 U.S.C. §§ 547(b) and 550. Cossitt testified that avoidance of Smith's judgment lien was "absolutely, without a question" a major consideration, in addition to the super discharge, in deciding whether to file for Chapter 13 reorganization. Transcript, (Docket No. 157, pp. 25-26).

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[7]IRS's Proof of Claim Nos. 2 and 3 were estimated claims because no tax return had been filed for years 2000 through 2003. The Chapter 13 Trustee's motion to dismiss was based on Debtor's failure to file tax returns due. Proof of Claim No. 6 filed by the IRS on November 1, 2004, amends the earlier claims and shows a priority claim for interest of $16.43 and a general unsecured claim for penalty of $23.01.

[8]Bank One's claim was assigned to B-First, LLC. Case Docket # 104.

[9]After conversion to Chapter 7 the Trustee filed a Notice of new claims bar date of July 11, 2005. Docket # 161.

In the main case Cossitt filed his First Application for Compensation on September 29, 2004, requesting professional fees of $8,677.00 and costs of $362.12. Smith filed objections, and Cossitt's First Application was set for hearing on December 9, 2004.

On October 27, 2004, almost four (4) months after the petition date, Debtor filed an application to employ Slover and Montana International Realty Plus as realtor for the estate. That application was granted, but after objections were filed and a hearing held, and the case was converted to Chapter 7, the Court vacated Slover's employment Order and denied the application.

Cossitt testified that, after the deposition of the Debtor in November 2004, it became obvious to him that the debtor had either intentionally misled Cossitt or had withheld information, and Cossitt demanded that the Debtor amend his Schedules and Statements. Transcript, p. 14. Cossitt stated that when the Debtor failed to produce the information he demanded, even after he granted the Debtor additional time, he acted promptly to withdraw as attorney.

On December 15, 2004, Debtor filed a motion to sell his homestead free and clear of liens to Henry and Victoria Schwanda for $350,000. After the hearing on Cossitt's First Application but before a decision was entered, Cossitt filed on January 5, 2005, a motion to convert the case to Chapter 7. That motion states that Debtor's employment has ended or will end soon and he no longer will have disposable income to fund a Plan. Cossitt testified that Agnew was terminated by his employer because of Smith's subpoenas served on Slover. Transcript, p. 28. Cossitt's billing entry for 12/27/2004, states that Cossitt learned the Debtor is in Minnesota and no longer working for the realty firm. The Court granted Debtor's motion to convert and converted the

case to Chapter 7 by Order entered January 5, 2005. As a result of conversion, the Court vacated the Order approving the employment of Slover and Montana International Realty and other pending motions, and denied Debtor's motion to sell the homestead to Schwandas by Order entered January 11, 2005.

Cossitt's First Application was granted in part by Memorandum and Order entered January 31, 2005, awarding Cossitt professional fees in the total amount of $4,677.00 and costs in the amount of $362.12, for services which began 6/2/2004 through 9/3/2004. Cossitt's services described in the First Application included prepetition services related to appeal of the state court judgment, preparation and filing of the Chapter13 petition, Schedules and Statements, and Plan, Smith's objection to exemption and motion to modify stay, and Debtor's motion to quash Smith's subpoena and show cause proceedings, and § 341 meeting preparation and various motions to dismiss.

After an answer was filed and a pretrial scheduling conference was held, trial of Adv. No. 04/103 was set for April 6, 2005, by Order entered November 23, 2004. Cossitt filed an amended complaint for the Debtor on December 17, 2004, adding a second and third count to determine the validity, priority and extent of Smith's judgment lien and to avoid Smith's asserted equitable lien under 11 U.S.C. § 544(a). Smith objected to the amended complaint and the matter was set for hearing on February 10, 2005. Another discovery dispute arose between the parties and the Debtor moved for a protective order on January 9, 2005, after the main case was converted to Chapter 7.

On January 19, 2005, Cossitt filed motions to withdraw as Plaintiff's counsel both in Adversary No. 04/103 based upon the conversion of the main case to Chapter 7, and in the main

case because of Debtor's failure to provide information necessary to amend Debtor's bankruptcy Schedules and Statements after Debtor's deposition taken in November 2004. The Court suspended the trial setting in Adversary No. 04/103 and other deadlines, and granted Cossitt's motions to withdraw[10]. Torgenrud appeared in Adversary No. 04/103 and has elected to pursue the preference litigation.

The § 341 meeting of the Debtor was scheduled to be held on February 28, 2005, by Notice entered January 5, 2005, but the Debtor failed to appear. Torgenrud continued the § 341 meeting and filed on March 3, 2005, a motion to compel Debtor's attendance. The Court granted the Trustee's motion to compel by Order entered March 17, 2005, which ordered that the Debtor be taken into custody to ensure his appearance. Torgenrud filed a report of that the § 341 meeting was held on March 11, 2005.

The billing statement attached to Cossitt's Second Application lists services provided and costs incurred from 9/3/04 through 1/5/05, in the combined total amount for this case of $23,338.26, for researching issues; preparing, filing and amending the complaint in Adversary No. 04/103; court appearances; conferences and other communications, preparing a draft summary judgment motion in Adversary No. 04/103 which was never filed but which Cossitt testified he is confident will benefit the estate; litigation regarding his First Application; deposition of the Debtor and post-deposition correspondence; work on the unsuccessful sale of Debtor's homestead; litigating discovery disputes in Adversary No. 04/103; and finally

[10]Another scheduling conference was held on March 16, 2005, with the Chapter 7 Trustee Don Torgenrud appearing. The Court is awaiting a stipulation between Torgenrud and the Defendant which is due April 20, 2005, which may govern future proceedings in Adv. No. 04/103.

converting the case to Chapter 7. Cossitt's Second Application requests $17,994 in fees and costs of $305.14. Cossitt testified that the case was one-third to a half more expensive than it should have been because of the "bombardment" of discovery by Smith. Transcript, pp. 10, 16. Cossitt admitted that his post-conversion fees are not compensable, but noted that he has logged $3,938.06 in post-conversion time for services in this case.

CONTENTIONS OF THE PARTIES

Smith and the Trustee both object to Cossitt's Second Application on the grounds the services he provided to the Debtor were not reasonable, necessary, or beneficial to the estate. Torgenrud contends that Cossitt's services for preparation of the summary judgment motion which was not filed in Adversary No. 04/103 was not a benefit to the estate; that Cossitt's services related to the Debtor's motions to sell property and to employ realtors were of no benefit to the estate because they were denied; that Cossitt's messages to potential Chapter 7 trustees were of no benefit to the estate; and that reorganization in this case was never a viable possibility because the Debtor never had sufficient income to fund a plan, and therefore Cossitt's fees for reorganization should be denied.

Smith contends that Cossitt failed to satisfy his burden of proof to show that his services benefitted the estate rather than himself and the Debtor's ongoing fraudulent conduct and animosity against Smith, which Smith contends continued in false statements and omissions in Debtor's Schedules. Smith contends, incorrectly, that the Trustee has not pursued the preference action. But Smith argues, like the Trustee, that Cossitt's professional services related to the employment of realtor and to sell property resulted in unnecessary litigation which did not benefit the estate and instead seeks to deplete the estate to the detriment of creditors. Smith also

contends that reorganization was not feasible in this case and the Debtors' petition was not filed in good faith as shown by Debtor's transfers of money and horses which were undisclosed until the Debtor's deposition. Smith argues that Cossitt's focus and efforts towards using property which the Debtor had fraudulently obtained from Smith to fund his reorganization was unreasonable "tunnel vision" which benefitted the Debtor, not the estate, and justifies denial of Cossitt's fees and costs.

Cossitt argues that the size of his fee request was caused by the aggressiveness of Smith's attorney Rhoades' discovery, to which he was obligated to respond to enforce the Court's local rules of accepted procedure and represent his client effectively. In addition to the discovery disputes, Cossitt asserts that his services related to the attempted sale of the property were reasonable and necessary to keep the case moving forward. Cossitt argues that it is too early to say whether his services in Adversary No. 04/103 benefitted the estate because the adversary is still proceeding, and his services may result in benefit to the estate.

DISCUSSION

1. § 330(a).

This Court has an independent obligation to review each application to evaluate the propriety of the compensation requested. *Berg*, 268 B.R. at 257, 19 Mont. B.R. at 240; *Crown Oil*, 257 B.R. at 537-38, 18 Mont. B.R. at 511; *In re Busy Beaver Bldg. Centers, Inc.*, 19 F.3d 833, 841 (3rd Cir. 1994); *In re Wildman*, 72 B.R. 700, 701 (Bankr. N.D. Ill. 1987). The Court has an independent obligation to review each application to ensure that applicants provide an adequate summary of work performed and costs incurred, according to the standards in 11 U.S.C. § 330(a)(3) and F.R.B.P. 2016(a) as discussed in *In re WRB-West Associates*, 9 Mont. B.R. 17,

18-20 (Bankr. Mont. 1990). *See Berg*, 268 B.R. at 257, 19 Mont. B.R. at 241; *Crown Oil*, 257 B.R. at 537-38, 18 Mont. B.R. at 511-12. The Court is obligated to review each request for fees and costs to determine whether the applicant provided:

1. a description of the services provided, setting forth, at a minimum, the parties involved and the nature and purpose of each task;
2. the date each service was provided;
3. the amount of time spent performing each task; and
4. the amount of fees requested for performing each task.

See Berg, 268 B.R. at 258, 19 Mont. B.R. at 242; *Crown Oil*, 257 B.R. at 539, 18 Mont. B.R. at 511-12. The burden of proof to show entitlement to all fees requested from the estate is on the applicant. *Berg*, 268 B.R. at 258, 19 Mont. B.R. at 242; *Crown Oil*, 257 B.R. at 538, 18 Mont. B.R. at 512; *In re WRB-West Associates*, 9 Mont. B.R. at 18-20; *In re Lindberg Products, Inc.*, 50 B.R. 220, 221 (Bankr. N.D. Ill. 1985).

The Trustee's and Smith's objections to Cossitt's Second Application cite *Berg* and *Crown Oil* for the proposition that Cossitt's professional services were not necessary or beneficial to the estate because the reorganization was never feasible. "While it is not necessary to have a successful reorganization in order for debtor's counsel to be awarded fees, fees may be denied when counsel should have realized that reorganization was not feasible and therefore services in that effort did not benefit the estate." *Berg*, 268 B.R. at 258, 19 Mont. B.R. at 242; *Crown Oil, Inc.*, 257 B.R. at 539, 18 Mont. B.R. at 513 *(quoting In re Kohl*, 95 F.3d 713, 714 (8th Cir. 1996); *In re Coones Ranch, Inc.*, 7 F.3d 740, 744 (8th Cir. 1993); *In re Lederman Enter., Inc.*, 997 F.2d 1321, 1324 (fees may be disallowed where counsel knew or should have known that reorganization was not a viable possibility).

Both *Berg* and *Crown Oil* involved Chapter 11 cases which were converted to Chapter 7,

while in the instant case Cossitt filed the motion to convert from Chapter 13 after his client failed to respond to his and the Trustee's requests for information. Despite that difference, this Court considers the analysis of *Berg* and *Crown Oil* under § 330(a) appropriate in a Chapter 7 case which has been converted from Chapter 13, with an important exception. In *Berg* the Court noted the time and effort required in preparation of a Chapter 11 plan and disclosure statement, *Berg*, 268 B.R. at 261, 19 Mont. B.R. at 247-48, which would not be the same as required under Chapter 13. However, § 330(a) makes no distinction between the Chapters. Plus, this Court has noted that cases which construe Chapters 11 and 12 of the Bankruptcy Code provide valuable tolls for interpretation of Chapter 13. *In re Hungerford*, 19 Mont. B.R. 103, 113-14 (Bankr. D. Mont. 2001); *In re Hanser/In re Fischer*, 16 Mont. B.R. 527, 528 n.1 (Bankr. D. Mont. 1998).

The fact that a Chapter 11 case generally requires a greater amount of professional services than a Chapter 13 case highlights the size of Cossitt's Second Application, $17,994 in fees requested, an amount which exceeds the total amount of fees requested by Chapter 11 reorganization counsel in *Berg*. 268 B.R. at 252; 19 Mont. B.R. at 232 (Chapter 11 reorganization counsel requested $16,687 in fees). Cossitt's fee request in this case in this case greatly exceeds the fees requested in most Chapter 13 cases in this district, and is more than ten (10) times the presumed reasonable fee provided under Mont. LBR 2016-1(b) of $1,750.

Furthermore, this did not have to be a complicated Chapter 13 case. Debtor never filed an objection to Smith's Proof of Claim, albeit Adversary No. 04/103 seeks to avoid Smith's judgment as a preference. Cossitt contends that the bombardment of discovery by Smith's attorneys in the main case and Adversary No. 04/103 required him to respond. However, the requirement under § 330(a) that compensation be reasonable does not give counsel a blank check

to rise to every gauntlet thrown. Many of the services incurred by Cossitt in his First Application related to proceedings to quash discovery in the main case which Cossitt argues was based on improper procedure. While that may be true, F.R.B.P. 2004 authorizes a party to move the court to order the examination of any entity, and for an attorney to issue subpoenas. A person who has consulted with an attorney "can be charged with constructive knowledge of the law's requirements." *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1050 (9th Cir.1987). Cossitt incurred substantial fees in a discovery dispute with Smith which resulted in settlement, but all parties were charged with knowledge that Rule 2004 required ultimately the examination of entities and production of documents sought by Smith, unless a protective order were sought. To the extent that Cossitt incurred services related to quashing a subpoena of Slover, who was not his client, those services simply provided no benefit to the estate.

Cossitt argues that certain of his services benefitted the Chapter 7 Trustee and the estate, but Cossitt has not been employed by the Chapter 7 estate. The United States Supreme Court has recently held that § 330(a)(1) does not authorize compensation awards to debtors' attorneys from estate funds unless they are employed as authorized by § 327, and if an attorney is to be paid from estate funds under § 330(a)(1) in a chapter 7 case, he or she must be employed by the trustee and approved by the court. *Lamie v. U.S. Trustee*, 540 U.S. 526, 538-39, 124 S.Ct. 1023, 1032, 157 L.Ed.2d 1024 (2004).

The Court does not agree that Smith's attorney is solely to blame for the extensive litigation in this case. Cossitt admits that Debtor made false statements and omissions in his Schedules and Statements, which to date still have not been amended. Debtor's Plan was filed containing a false statement that he had filed all tax returns which were due. The Plan was to be

funded with income including Debtor's self employment as a realtor on Schedule I, a plan payment of $58, but subsequent proceedings disclosed that the Debtor was employed in Slover's real estate office. And, Debtor's answer on his Statement of Financial Affairs to question 1 conflicts with his statement on Schedule I that he earns $1,000 per month, since question 1 states that as of July 12, 2004, more than halfway through the year, he had earned $0.00 in 2004. Cossitt invited litigation when he applied for employment by the estate of the realtor office where the Debtor was employed, as realtor for the estate despite the obvious potential lack of distinterestedness which prompted objection by Smith.

Debtor's $58 monthly payment over 36 months would produce plan payments totaling $2,088, an amount insufficient to pay Cossitt's $17,994 fee request or creditors. In order for Debtor's Chapter 13 case to succeed the Debtor's Plan had to provide for the sale of his homestead[11]. Debtor filed his Plan on July 21, 2004, 19 days after the petition date. Yet, notwithstanding the minimal plan payment and plan provision for sale of his homestead and fund the Plan, Cossitt did not file an application to employ a realtor for more than another 3 months, until October 27, 2004. Instead of concentrating on selling Debtor's homestead and satisfying the requirements to confirm Debtor's Plan, which we now know Debtor could not accomplish because of his false Schedules and failure to file tax returns, Cossitt engaged in protracted litigation with Smith involving discovery and futile procedural disputes running up fees now in excess of $20,000.

The test for compensation under § 330(a) is not that of a "contingency fee". *Berg*, 268

[11]Chapter 13 plans funded by sale of property are discussed in *In re Siegfried*, 16 Mont. B.R. 289, 300 (Bankr. D. Mont. 1997), and *In re Murphy-Reyner*, 19 Mont. B.R. 141 (D. Mont. 2001).

B.R. at 260, 19 Mont. B.R. at 245; *Crown Oil, Inc.*, 257 B.R. at 540, 18 Mont. B.R. at 515. The test is whether the applicant's services were necessary and beneficial to the estate, not whether the debtor's activities, in hindsight, were necessary to achieve whichever outcome occurs. *Berg*, 268 B.R. at 260, 19 Mont. B.R. at 245-46; *In re Polishuk*, 258 B.R. 238, 248-49 (Bankr. N.D. Okla. 2001). "[T]he applicant must demonstrate only that the services were 'reasonably likely' to benefit the estate at the time the services were rendered." *Berg*, 268 B.R. at 260, 19 Mont. B.R. at 246, *quoting Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug* Company, (*In re Mednet*), 251 B.R. 103, 108 (9th Cir. BAP 2000). On the other hand, "an attorney fee application in bankruptcy will be denied to the extent the services rendered were for the benefit of the debtor and did not benefit the estate." *Berg*, 268 B.R. at 260, 19 Mont. B.R. at 246; *Crown Oil*, 18 Mont. B.R. at 515, 257 B.R. at 540; *Kohl*, 95 B.R. at 714 (*quoting In re Reed*, 890 F.2d 104, 106 (8th Cir. 1989)). "This rule is based upon the legislative history of the Bankruptcy Code section 330(a) and the unfairness of allowing the debtor to deplete the estate by pursuing its interests to the detriment of creditors." *Id.*; *Kohl*, 95 F.3d at 714 (*quoting In re Hanson*, 172 B.R. 67, 74 (9th Cir. BAP 1994)); *see also In re Mahaffey*, 18 Mont. B.R. 285, 290 (Bankr. Mont. 2000).

In the instant case, upon review of the record and Smith's allowed Proof of Claim, to which no objection has ever been filed and thus constitutes prima facie evidence of its validity and amount, F.R.B.P. 3001(f), the Court finds that Debtor's delay in selling his homestead in this case is simply a continuation of his delay and fraudulent conduct noted in the state court's findings, conclusions and judgment attached to Smith's Proof of Claim, at pages 3-4. Cossitt's Applications for legal services in this case seek to place Cossitt ahead of Smith as an administrative claim, thereby benefitting the Debtor and Cossitt for his services prolonging the

delay, and depleting the estate at the expense of creditors.

Benefit to the estate is not restricted to only monetary benefit. *Berg*, 268 B.R. at 260-61, 19 Mont. B.R. at 246-47; *Crown Oil*, 257 B.R. at 540, 18 Mont. B.R. at 515; *Kohl*, 95 F.3d at 715; *In re Holder*, 207 B.R. 574, 584 (Bankr. M.D. Tenn. 1997). Another important consideration is whether the services rendered "promoted the bankruptcy process or administration of the estate in accordance with the practice and procedures provided under the Bankruptcy Code and Rules for the orderly and prompt disposition of the bankruptcy cases and related adversary proceedings." *Berg*, 268 B.R. at 260-61, 19 Mont. B.R. at 247; *Crown Oil*, 257 B.R. at 540, 18 Mont. B.R. at 515, *In re Holder*, 207 B.R. at 584 (*quoting In re Spanjer Bros., Inc.*, 203 B.R. 85, 90 (Bankr. N.D. Ill. 1996)).

The Court notes Cossitt's efforts in initiating Adversary No. 04/103, and agrees that some benefit to the estate may result. In addition, the fact that the Plan was not confirmed does not, by itself, bar recovery of compensation under § 330 for services performed in the Chapter 13 case. *Berg*, 268 B.R. at 261, 19 Mont. B.R. at 247; *Crown Oil*, 257 B.R. at 541, 18 Mont. B.R. at 517. On the other hand, whether a reorganization is successful is a factor to be considered in determining whether an attorney's services benefitted an estate. *Berg*, 268 B.R. at 261, 19 Mont. B.R. at 247-48; *Crown Oil*, 257 B.R. at 541, 18 Mont. B.R. at 517-18; *In re MFlex Corp.*, 172 B.R. 854, 857 (Bankr. W.D. Tex. 1994); *In re Lederman Enterprises, Inc.*, 143 B.R. 772, 775, (D. Colo. 1992), *aff'd*, 997 F.2d 1321 (10th Cir. 1993). Applying this law to the instant case, the Court must consider as a factor that the Debtor's Chapter 13 Plan was not successful, nor was it likely at the time the Plan was filed when the Schedules were incomplete, income was not being earned and Debtor's tax returns were not filed as represented under penalty of perjury in his Plan.

As one bankruptcy court wrote: "The Court does not expect the attorney to succeed in every endeavor he undertakes on behalf of the client. But the endeavor for which the estate is expected to pay must be reasonably calculated to produce a benefit to the estate." *Berg*, 268 B.R. at 261, 19 Mont. B.R. at 248*; Crown Oil*, 257 B.R. at 541*,* 18 Mont. B.R. at 518, *In re Hunt*, 124 B.R. 263, 267 (Bankr. S. D. Ohio 1990).

Turning to the preference action, if Adversary No. 04/103 results in judgment for the Defendant there will be no benefit to the estate from Cossitt's services. Conversely, if the result is a judgment avoiding Smith's judgment as a transfer it will benefit the estate, and Cossitt should be reasonably compensated for that benefit. In determining the ultimate benefit to the estate, however, it must be noted that no objection has been filed to allowance of Smith's claim, which was not listed on Schedule D as contingent, unliquidated or disputed. Smith's claim is therefore allowed in the amount of $466,911.24 as stated on Proof of Claim No. 5. If Smith's judgment is avoided as a preference she would be left with a general unsecured claim of $466,911.24 out of a total of $489,420.32 in allowed general unsecured claims filed to date, or 95.40 percent (95.4%) of the total. Cossitt seeks compensation for recovering property, the proceeds from which would be paid, after sales commissions, closing costs and administrative claims in which Cossitt hopes to be included are paid, at a ratio of 95.4% to Smith and the remainder to creditors. The other general unsecured claims total $22,509.08, less than Cossitt's total compensation requested in his two Applications.

This Court wrote in *Crown Oil*: "The bankruptcy court has wide discretion over whether to allow fees, regardless of their excessiveness or reasonableness." *Crown Oil*, 257 B.R. at 541, 18 Mont. B.R. at 517; *In re Columbia Plastics, Inc.*, 251 B.R. 580, 591 (Bankr. W.D. Wash.

2000) (*citing In re Lewis*, 113 F.3d 1040, 1046 (9th Cir. 1997). If the court determines that some or all of the legal services provided were not likely to benefit the estate or were not necessary for the case, the court may award less compensation than requested. *In re Riverside-Linden Investment Co.*, 925 F.2d 320, 322-23 (9th Cir.1991) (court may decline to award attorneys' fees where the time expended cannot be justified by a cost-benefit analysis). Based on the limited maximum "benefit" to the estate where in the best case scenario Smith will receive a 95.4% distribution of funds distributed to general unsecured creditors, the failure of Debtor's Chapter 13 Plan and excessive and unnecessary discovery and other litigation, this Court determines in its exercise of its wide discretion that Cossitt has failed to satisfy his burden of proof to allowance of any additional compensation requested in his Second Application. *Berg*, 268 B.R. at 258, 19 Mont. B.R. at 242; *Crown Oil*, 257 B.R. at 538, 18 Mont. B.R. at 512; *In re WRB-West Associates*, 9 Mont. B.R. at 18-20; *In re Lindberg Products, Inc.*, 50 B.R. 220, 221.

Cossitt's First Application resulted in an award of $4,677.00 fees and costs in the amount of $362.12 for services rendered through 9/3/04. With the subsequent application for compensation by Cossitt, however, the First Application necessarily became an interim application under 11 U.S.C. § 331. Interim fee awards are interlocutory only and not a final adjudication of the issue of compensation. *In re Columbia Plastics, Inc.* 251 B.R. 580, 590 (Bankr. W.D. Wash. 2000); *In re Callister*, 673 F.2d 305, 307 (10th Cir. 1982). The relief awarded under 11 U.S.C. § 331 in no way restricts a bankruptcy court's ability to craft a final award under § 330, because interim awards are always subject to the court's reexamination and adjustment during the course of a case. *Leichty v. Neary (In re Strand)*, 375 F.3d 854, 858 (9th Cir. 2004).

Certainly the record before the Court when it took up Cossitt's First Application after hearing on December 9, 2004, was a different record than the instant record of Debtor's misrepresentations, omissions, and failed Chapter 13 which was converted. For the above reasons the Court deems it appropriate to revisit Cossitt's First Application to craft a reasonable final award under § 330(a).

Mont. LBR 2016-1(b) provides for a presumed reasonable fee in a Chapter 13 case of $1,750 if a plan is confirmed. Cossitt's interim fees already awarded in this case of $4,677 more than double the presumed reasonable fee. The additional $17,994 requested in the Second Application is more than ten times the presumed reasonable fee, in a case which resulted in conversion on Debtor's motion instead of a confirmed Chapter 13 Plan, and an undue amount of litigation. Based on the above discussion and benefit to the estate reasonably to be expected as a result of Cossitt's services, the Court exercises its wide discretion and awards Cossitt the $4,677 in fees and $362.12 already allowed as total reasonable and necessary compensation for his services in this case, and denies Cossitt any additional compensation or reimbursement for costs under § 330(a). *Crown Oil*, 257 B.R. at 541, 18 Mont. B.R. at 517; *In re Columbia Plastics, Inc.*, 251 B.R. at 591 (*citing In re Lewis*, 113 F.3d at 1046).

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this Chapter 7 bankruptcy under 28 U.S.C. § 1334(a).

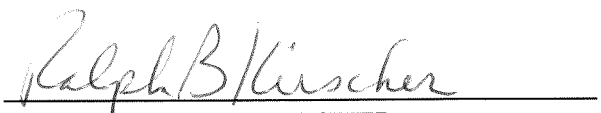
2. Cossitt's Second Application for professional fees and costs is a core proceeding concerning administration of the estate under 28 U.S.C. §§ 157(b)(2)(A) and (B).

3. Cossitt's Second Application is denied in its entirety under the Court's exercise of its wide discretion under 11 U.S.C. § 330(a) on the grounds the services were not reasonably

calculated to be and were not necessary and beneficial to the estate. The services were for the benefit of the Debtor and did not benefit the estate. Cossitt's allowed professional fees and costs in this case shall be limited to the $4,677 and $362.12 awarded by Order entered by the Court on January 31, 2005, as a second-tier administrative expense.

IT IS ORDERED that a separate Order shall be entered in conformity with the above, denying Cossitt's Second Application for Professional Fees and Costs filed February 14, 2005, and limiting Cossitt's allowed fees and costs to the $4,677 fees and $362.12 costs awarded by Order entered on January 31, 2005, as a second-tier administrative expense.

BY THE COURT



HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana